

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

ANITA SUE WHORTON,)	
)	
Petitioner,)	
vs.)	NO. CIV-07-0915-HE
)	
MILLICENT NEWTON-EMBRY,)	
Warden,)	
)	
Respondent.)	

ORDER

Petitioner Anita Whorton, a *pro se* state prisoner, filed a motion to vacate a sentence pursuant to 28 U.S.C. § 2255. Pursuant to 28 U.S.C. § 636(b)(1)(B), this matter was referred to Magistrate Judge Robert E. Bacharach.

On August 20, 2007, Judge Bacharach entered an order informing the petitioner that § 2255 provides relief to those in federal custody, not state custody, and that her action could correctly be filed as a writ of habeas corpus petition pursuant to 28 U.S.C. § 2254. *See* Doc. # 5. The order required petitioner to state in writing no later than September 4, 2007 whether she would like her motion to vacate to be considered as a habeas petition pursuant to § 2254. The order further required petitioner, if she wanted to pursue her action under § 2254, to provide a corrected caption and pay the \$5.00 filing fee or move for pauper status by September 4, 2007. On September 14, 2007, Judge Bacharach, noting that the petitioner had not responded to his order and that her deadline to respond had expired ten days prior, entered his Report and Recommendation, recommending that the action be dismissed because the petitioner's conviction and sentence were rendered in state court, not federal court, and

§ 2255 provides relief only to those in federal custody.

On September 20, 2007, the petitioner filed a letter to Judge Bacharach, stating that she was enclosing “proof of payment with habeas form 28 U.S.C. 2254”¹ and asking Judge Bacharach to “allow [her] filing to proceed through the normal procedures and handling.” The letter also indicates that her tardiness in filing a response to Judge Bacharach’s order was “due to staff in the law library and accounting.”

The court does not view the petitioner’s September 20, 2007 letter as clearly requesting the court to recharacterize her motion to vacate as a habeas petition pursuant to § 2254. At best, the letter is ambiguous as to the petitioner’s intention. Further, the court notes that the petitioner has not complied with the requirements imposed by Judge Bacharach’s August 20, 2007 order as to submitting a corrected caption and paying the filing fee.²


Accordingly, the court concurs with Judge Bacharach that the petitioner’s motion should be dismissed instead of recharacterized. The court **ADOPTS** the Report and Recommendation [Doc. # 6] and **DISMISSES** the petitioner’s motion to vacate.

IT IS SO ORDERED.

¹*The filing does not contain a § 2254 form.*

²*While the petitioner states she enclosed proof of payment with her letter, the document she submitted shows only that \$2.50 was paid for first class postage, not for the filing fee.*

Dated this 13th day of December, 2007.



JOE HEATON
UNITED STATES DISTRICT JUDGE

